

## INTRODUCTION

### Purpose

We hope that this planning bulletin will outline a straightforward procedure for consultation regarding possible impacts of federally-assisted projects on places which may be important to the heritage of the United States, Montana and its local communities, as well as projects proposed on state lands which might affect state Heritage Properties. This guide will be most useful to applicants, property owners, managers, and those agencies without cultural resource staff that rely on cultural resource consultants, or any one new to the process. However, consultants and agencies may find it generally useful also.

Historical and archaeological sites are often referred to as cultural resources. The National Historic Preservation Act identifies cultural resources under consideration both as "Historic Properties" and "historic resources", meaning in both cases, any prehistoric or historic district, site, building, structure, or object listed in or eligible for listing in the National Register of Historic Places. The Advisory Council on Historic Preservation again specifies that "Historic Properties" refers to places, records, objects or remains that are listed in or eligible for listing in the National Register.

In this document, cultural resource or site refers to any historical, archaeological or traditional cultural place or object whether or not it has been found to be listed in, or eligible for listing, in the National Register. Historic sites include districts, structures, and buildings, as well as, linear features such as trails, roads and

railroads, which are fifty or more years old. Archaeological sites are evidence of past human occupation and behavior that may include both historic and precontact material cultural remains or both. Traditional Cultural Properties refer to places important to continuing historic traditions. Historic Properties (for federal undertakings) or Heritage Properties (for State lands) will refer specifically to any such cultural, historic or archaeological resources, or sites, which have been determined to be Eligible for listing in the National Register (see below). The consultation process described here is constructed, in state and federal statutes and regulations, for the purposes of identifying and considering effects to Historic or Heritage Properties, i.e. eligible sites.

The National Historic Preservation Act (NHPA) declared that the preservation of our Nation's irreplaceable heritage was in the public's interest, and called upon federal agencies to expand and accelerate preservation activities in a spirit of stewardship and partnership with states, Indian Tribes, the public and local governments.

To that purpose the National Historic Preservation Act, as well as the State Antiquities Act, call upon the SHPO to develop state level guidance in historic preservation and compliance. These guidelines do not supercede more detailed Advisory Council on Historic Preservation regulations (36 CFR 800) or guidance from the Keeper of the National Register that are referenced throughout the text. Our guidance is offered as an introduction to the process as we have experienced it, working in the State of Montana. Our interpretation of general federal regulations and guidance is not offered as

any kind of legal advice, but rather as our view of, and recommendations for, conducting cultural resource consultation with us.



#### Responsibilities of the State Historic Preservation Office (SHPO)

The SHPO is charged with advising, assisting and cooperating with federal, state, tribal and local authorities to ensure historic properties in Montana are taken into consideration at all levels of planning and development (Section 101(b)(3) NHPA). The SHPO reflects the interests of the State and its citizens in the preservation of their cultural heritage (36 CFR 800.2(c)(1)). Examples of places important to that heritage include buildings, or other structures, irrigation ditches, mines, railroads, structural ruins, stone alignments, stone rings, art carved into or painted on rock outcrops, and sites of precontact human occupation. The SHPO is particularly concerned about properties that are important enough to be listed on, or eligible to be listed in the National Register of Historic Places. Criteria for Eligibility to the National Register are listed in the Evaluation section below. By statute and rules, the State Antiquities Act refers to these same criteria. The SHPO is the appointed representative of State and local

preservation concerns in the review and consultation process for both 36 CFR 800 (the Section 106 review process) and State Antiquities Act review.

Technically, the SHPO is also responsible for reviewing impacts to paleontological remains on state lands. This is accomplished by State Antiquities Act permit reviews.

#### Participation by Applicants in the Review Process

Agencies rather than applicants or consultants are responsible for consulting with the SHPO regarding all projects the agency assists, undertakes, permits or licenses (that is to say “undertakings”). In some instances, however, the agency expects the recipient of the funding, license or permit to carry out some of this consultation or identification effort. **To ensure that the project will not be unnecessarily delayed, it is important that applicants ask agencies whether they, or the agency, will initiate consultation with SHPO.** The SHPO should be notified by the agency (36 CFR 800.2(c)(5)) early in any such agreements in order to avoid confusion. In any event agencies remain responsible for all consultations and only agencies make determinations of eligibility, findings of effects and treatment provisions.

#### The Role of the Advisory Council on Historic Preservation (ACHP)

The Advisory Council on Historic Preservation (ACHP) defines and provides general oversight of the Section 106 review process as specified in the National Historic Preservation Act of 1966, amended. 36 CFR 800 are the implementing regulations written by the ACHP. NHPA (Section 106) and 36 CFR

800 both require that agencies provide the ACHP the opportunity to comment throughout the process. The public and other parties may request ACHP review of agency findings at any time (36 CFR 800.2(b)(2) and .9(a)). Otherwise, the ACHP does not actively participate in routine consultation unless requested by a consulting party. For example, the ACHP no longer routinely reviews No Adverse Effect findings, if the SHPO has agreed, and there is no protest from consulting parties or other reason for outstanding concern. However, during Step Three, the Effect Assessment step, agencies are required to notify the ACHP of all findings of Adverse Effect. The ACHP will then determine whether its involvement in resolving adverse effects is necessary in order to meet the purposes and intent of the NHPA and 36 CFR 800. Criteria for ACHP individual case participation are found at Appendix A to Part 800, 36 CFR 800, and include undertakings having substantial impacts to important Historic Properties, important questions of policy or interpretation, potential procedural problems, or issues of concern to Indian or Native Hawaiian groups. Although Adverse Effect findings are the most comment reason for ACHP participation, disagreements about the potential for an undertaking to affect Historic Properties, the Area of Potential Effect (that is to say, the area in which possible effects to historic properties should be considered and which is defined further below), adequacy of inventory or treatment plans, may also be referred to the ACHP by consulting parties. The SHPO, the agency, or other parties may request Council involvement if routine consultation is unproductive (36 CFR 800.2(b)(2)).

#### Role of the Keeper of the National Register (the Keeper)

The Keeper of the National Register is delegated by the Secretary of the Interior and National Park Service with the responsibility for listing properties in the National Register of Historic Places (NR) and determining the eligibility of properties for inclusion in the NR. The Keeper is seldom directly involved in the Section 106 process because the SHPO is the official delegated the responsibility to review the eligibility of sites in the 106 process. However, should the SHPO and an agency disagree about eligibility, the Keeper may be requested to make a final determination for the purposes of Section 106 under 36 CFR 60. The National Register criteria are directly relevant to the Section 106 process as a guide to recognizing the values and characteristics that should be considered in evaluating cultural resources. In the section 106 process, the same standards for determining whether a property is eligible for listing in the National Register of Historic Places act as a guide in evaluating the historic significance of cultural resources.

#### Tribal Historic Preservation Offices (THPO)

Section 101 (d)(2) of the NHPA provides that tribes may assume all or any part of the SHPO functions with respect to tribal lands provided the Secretary of Interior acting through the Director of the National Park Service finds that the tribe is capable of carrying out the functions it proposes to assume. Regulations formalizing that process can be found at <http://www2.cr.nps.gov/tribal/thpo.htm>. Historic Preservation Fund Grants to Indian Tribes may also be available (Tribal Preservation Program, Heritage Preservation Services, National Park Service, 1849 C St. NW Washington D.C. 20240 (202) 343.9572). Currently there

are three THPOs in Montana:

Marcia Pablo, Confederated Salish and Kootenai Tribes, POB 278, Pablo MT 59855 (406) 675-2700

Gilbert Brady, Northern Cheyenne Tribe, POB 128 Lame Deer MT 59043 (406) 477-6035

Joan Mitchell, Rocky Boys Chippewa Cree Tribes, RR 1 #544, Box Elder MT 59521 (406) 395-4147.

#### Programmatic Agreements

It is sometimes possible for a Federal agency to customize or expedite the cultural resource review process for certain classes of activities by entering into an agreement with the SHPO and the Advisory Council on Historic Preservation. For example, by agreement, it may be determined that certain kinds of agency activity will likely have no effect on historic or archaeological properties, and that the agency need not submit such projects for review. Use of these agreements may change the cultural resource review and consultation process from that of 36 CFR 800. Currently the MT SHPO has specific Programmatic Agreements with a number of communities regarding CDBG grants and rehabilitation programs, with some individual Forests regarding trails and logging properties, with Federal Highways and Montana Department of Transportation regarding historic irrigation ditches, roads and bridges, and with the Bureau of Reclamation (BOR) regarding cabin leases, to name a few. MT SHPO also has very broad Programmatic Agreements with the USDA Forest Service Northern Region and with the Bureau of Land Management (BLM) for conducting historic preservation compliance in

general. The ACHP regulations providing for such alternative programs are found at 36 CFR 800.14, and guidance on preparing such agreements can be found in the ACHP's *Preparing Agreement Documents*. PAs are most useful for considering the effects of routine and repetitive undertakings in a broad temporal or spatial approach, or where administrative decisions which may affect Historic Properties will be made before all Historic Properties in an APE can be identified and evaluated, or before possible effects to them can be assessed.

#### Coordination of Review under the National Historic Preservation Act and The National Environmental Protection Act

Compliance with the National Environmental Protection Act (NEPA) does not alone constitute compliance under Section 106 of the National Historic Preservation Act (NHPA). While certain federal agency responsibilities are related in purpose under both laws, there are differences in scope and procedure. For example, many actions qualify as categorical exclusions under NEPA but require review under Section 106. Moreover, an Adverse Effect under the NHPA may not require an EIS under NEPA. Public disclosure under NEPA also does not necessarily satisfy the public involvement process of 36 CFR 800 or Section 110 of the NHPA. Finally, an EA/EIS that results in irreversible or irretrievable commitment to actions (such as an oil/gas lease EIS) with reasonably foreseeable effects prior to completion of the Section 106 process will not be in compliance with the NHPA.

While separate laws, Federal Agencies are encouraged to coordinate compliance with Section 106 of the NHPA and the

requirements of the NEPA. ACHP regulations concerning coordination requirements, including notification to the SHPO and the ACHP of an agency's intent to use the NEPA process in lieu of 800.3-8, are found at 36 CFR 800.14. Coordination of 36 CFR 800 responsibilities with NEPA is addressed at §800.8.

Generally speaking, determinations of Eligibility and Effect under 36 CFR 800 should be completed during the preparation of a NEPA EA, DEIS, or EIS and **prior to release of a FONSI (Finding of No Significant Impact) or ROD (Record of Decision)** unless the agency has met the requirements at 36 CFR 800.14. Nonetheless, phased identification, evaluation, and effect findings are recognized in the ACHP regulations (§800.4(b)(2), .5(a)(3)). In our experience such alternative procedures are best set out and agreed upon within the context of PAs.



If an agency wishes to use the NEPA process for the purposes of the NHPA the agency must notify the SHPO and the ACHP in advance and follow the standards set out at 36 CFR 800.8(c). Coordination of Section 106 and NEPA

may also raise concerns about release of information or public disclosure. Please see the subsection Confidentiality for more information on this critical concern. Also see King 2002 for potentially useful suggestions for coordination of NEPA and Section 106 compliance.

#### Four Steps To Review and Consultation

This document is aimed at assisting interested parties in reporting necessary information to the State Historic Preservation Officer (SHPO) as part of the "review and consultation" or "review and compliance" process. Review and consultation is the procedure whereby the SHPO reviews documentation of federal and state undertakings as part of federal or state agencies' compliance with either federal regulations found at 36 CFR 800 (which implement Section 106 of the National Historic Preservation Act of 1966 as amended 1992) or with the Montana State Antiquities Act (amended 1995). Please remember that it is agencies, rather than project proponents, which must comply with cultural resource review laws and regulations, and that the SHPO is but one consulting entity in the process. The review and consultation process (often referred to as "compliance" or "cultural clearance") can be understood as a set of sequential steps of assessment and evaluation carried out by agencies in consultation with the SHPO and others. These steps may simply be titled:

- 1) Initiate Consultation Process
- 2) Identify Historic Properties
- 3) Assess Adverse Effects
- 4) Resolve Adverse Effects.

These Guidelines have been organized around these four steps. Although federal regulations differentiate the steps, they

may overlap in practical application. For example, some agencies combine the identification and effect assessment steps (Steps 2 & 3). This is often done by conducting cultural resource surveys (the physical search for and recording of cultural resources) and submitting an inventory report (a compilation of information resulting from field survey, records or archival research, oral interviews, etc. about cultural resources in the area of concern) to SHPO along with agency determinations about their importance and possible impacts to them. However, each step must be complete for all Historic Properties before moving formally to the next step. (Programmatic Agreements can be an exception.) The process is sequential for good reasons. Most importantly, the SHPO is unable to concur with an Effect Finding (the overall or comprehensive effect of an action or decision) until the Eligibility of all cultural resources and the impact on all eligible properties that are not avoided, has been resolved. The impacts to each Historic Property are considered in a comprehensive effect assessment, which takes into account the total Effect of the undertaking on all Historic Properties in the subject area. As the regulations point out at 36 CFR 800.3(g), the sequential steps are also intended to provide consulting parties and the public adequate time to review and comment at specified and known points in the process.

King, Thomas F. Cultural Resources in an Environmental Assessment under NEPA. Environmental Practice 4:137-144 (2002).

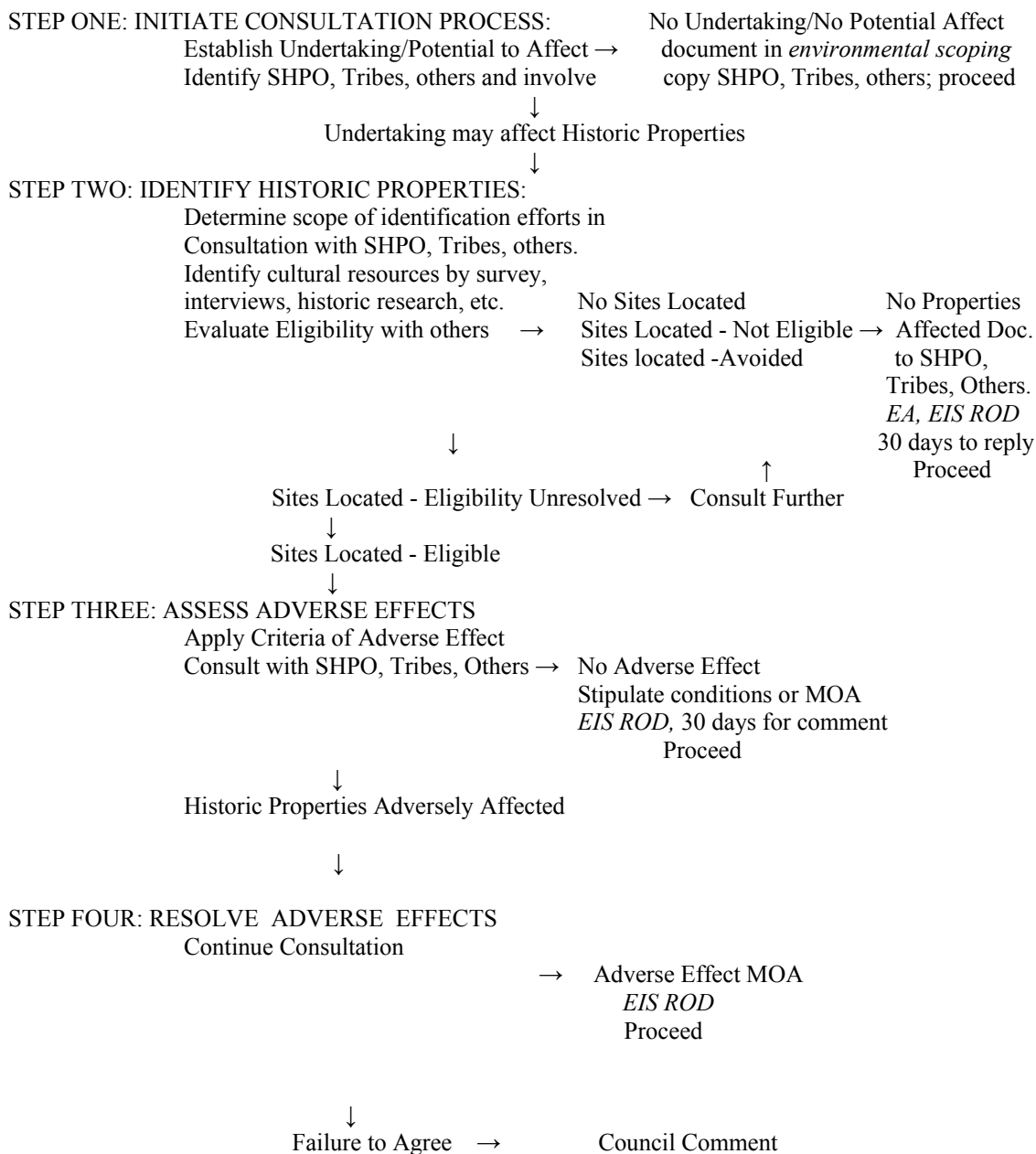
King, Thomas F. Federal Planning and Historic Places: the Section 106 Process. Alta Mira Press. 2000.

Environmental Justice Guidance Under NEPA. Council for Environmental Quality 1997. See also 40 CFR 1508.

NEPA for Historic Preservationists and Cultural Resource Managers. National Preservation Institute. [www.npi.org](http://www.npi.org) Tools for Cultural Resource Managers.

CONSULTING WITH MT SHPO  
SECTION 106 PROCESS (NEPA COORDINATION STEPS IN ITALICS)

Figure 1



Adapted in part from ACHP and NPS NEPA Training Charts 1999